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IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No.

S. KLEIN ON THE SQUARE, INC.,

Petitioner,

against

THE LIONEL CORPORATION,

Respondent.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York affirming the judgment of the Supreme Court of New York, Appellate Division, First Department, which had, in turn, affirmed a judgment of the Supreme Court, New York County, granting an injunction against petitioner under New York's "Fair Trade" Act (General Business Law, Article XXIV-A, McKinney's New York Consolidated Laws). The opinion of the New York Court of Appeals, and the decision in the New York Supreme Court, are attached as an appendix to this petition (*infra*, p. 13). The opinion of the Court of Appeals is officially reported at 307 N. Y. 229 (Advance) and 120 N. E. (2d) 802.

Grounds of Jurisdiction

Date of Judgment and of Entry

The judgment sought to be reviewed is a judgment of the Court of Appeals affirming the judgment of affirmance, entered by the Supreme Court, Appellate Division, First Department, of a final judgment of the Supreme Court, New York County, granting injunctive relief to respondent as prayed for in its complaint. The judgment of the Court of Appeals sought to be reviewed was rendered on June 4, 1954. The same judgment is before this Court for review on appeal, *S. Klein on the Square, Inc.* v. *The Lionel Corporation,* October Term, 1954. A Statement as to Jurisdiction with respect to said appeal is being filed concurrently with the filing of this Petition.

Statutory Provision Believed to Confer Jurisdiction

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257 (3), which provides for the issuance of a Writ of Certiorari in any case (a) "where the validity of a * * * statute of the United States is drawn in question", (b) "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States", or (c) "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of the United States".

Question Presented

The Question Presented by this Petition for Certiorari is intimately connected with the second question presented by the appeal being taken in the same cause pursuant to 28 U. S. C. §1257 (2). The appeal in this cause, in turn, presents essentially the same questions as are raised in

Grayson-Robinson Stores, Inc. v. *The Lionel Corporation,* Docket No. 312, October, 1954 Term, an appeal from a judgment of the New Jersey Supreme Court in a similar cause involving the petitioner's corporate parent and the respondent Lionel Corporation. Both appeals involve the constitutionality of the state "fair trade" laws, as applied, under the due process clause of the Fourteenth Amendment and the commerce clause of the Federal Constitution. The Question Presented by this Petition is:

Is Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45), as amended by the McGuire Act (Act of July 14, 1952, Chapter 745, 66 Stat. 632), invalid under the commerce clause as an unlawful exercise of Congress' power to regulate commerce under the Constitution, insofar as it purports to authorize the states to enforce resale price maintenance on goods distributed in interstate commerce?

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is Article I, Section 8, clause 3 of the Constitution of the United States (the commerce clause), which provides as follows:

> "The Congress shall have Power • • •
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The statutory provisions involved are Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45), as amended by the McGuire Act, *supra,* and Article XXIV-A of the General Business Law of the State of New York. The said statutory provisions are set forth in the Appendix hereto, beginning at page 9.

Statement of the Case

The petitioner, a New York corporation, operates "S. Klein on the Square," a department store in New York City. The S. Klein store policy is to offer merchandise at bargain prices. This is done by reducing costly sales service provided by other stores, and by the economies of large-scale purchasing.

The respondent, a New York corporation, manufactures toy trains and accessories which it distributes in interstate commerce throughout the country. Respondent's manufacturing activities are carried on both in and outside New York. Respondent sought to fix the prices at which its trains can be sold at retail in the State of New York. To this end, respondent entered into "agreements" with certain New York retailers other than petitioner, under which those retailers agreed to sell the respondent's toy trains at prices fixed by the appellee. Section 369-b of New York's General Business Law, quoted *infra*, p. 9 (the so-called "non-signer" clause found in all state "fair trade" acts), prohibits *all* retailers in the state from selling below prices established by an agreement between a vendor and *any* retailer within the state. Petitioner, however, not being a party to any such agreement, offered respondent's trains, in accordance with its regular trade policy, at prices below those fixed under the respondent's agreements with other retailers. Respondent thereupon commenced this action in the New York Supreme Court, New York County, to enjoin the petitioner from continuing to offer respondent's products at below respondent's "fair trade" prices.

Respondent answered, and the cause was submitted on stipulated facts. The Supreme Court granted judgment for respondent, and a judgment was entered, pursuant to § 369-b of the General Business Law, enjoining petitioner from selling respondent's toy trains below prices fixed by respondent. Petitioner appealed to the Appellate Division of the Supreme Court, which affirmed the judgment below.

On further appeal, the Court of Appeals affirmed the Appellate Division's judgment of affirmance.

Raising the Federal Question

The Federal question presented by this Petition was timely raised by the appellant's answer in the trial court as an independent ground for dismissing the action, and was preserved by appellant in the New York Court of Appeals. It was passed upon by the Court of Appeals in awarding judgment against defendant. All this appears from the record, as follows:

Appellant's answer:

"FOR A SIXTH SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, ALLEGES:

* * * * *

26. If applied to compel defendant to sell said products at prices not below those allegedly fixed by the plaintiff, Section 5(a) of the Federal Trade Commission Act, as amended by the Act of Congress of July 14, 1952, is unconstitutional in that it constitutes an unreasonable delegation to the separate states and to private persons of the powers vested in the Congress of the United States by Article I, Sections 1 and 8 of the Constitution of the United States" (R. 29).

Court of Appeals Opinion:

"Defendants now present a new constitutional challenge by attacking the Maguire Act (66 U. S. Stat. 632, U. S. Code, tit. 15, § 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Corp.* (341 U. S. 384). That act exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against nonsigners as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the States power over interstate commerce which is denied them under the Federal Constitution."

Reasons for Allowance of the Writ

In the appeal taken in this same cause, petitioner has presented the question whether New York's Fair Trade Law, as applied to goods which move in interstate commerce, is invalid under the commerce clause In presenting that question, petitioner has argued that the effort of Congress, through the McGuire Act, to immunize state "fair trade" laws from the effects of the commerce clause is ineffective, and that the New York statute, as applied, is consequently invalid under that provision of the Constitution. The Question Presented by this Petition—the invalidity of the McGuire Act itself—is, in a sense, the converse of the question on the appeal. We respectfully request the Court, therefore, to consider this Petition in the light of the petitioner's Statement as to Jurisdiction on the appeal.

By the McGuire Act, Congress purports to permit the application of State Fair Trade laws to goods moving in interstate commerce. It has done this in two ways: a) by providing in Section 5(a)2 and 3 of the Federal Trade Commission Act, as amended, that resale price maintenance agreements, and the enforcement, under state law, of resale price maintenance against "non-signers", shall not be deemed to violate federal statutes; b) by providing, in Section 5(a)(4) of that Act, as amended, that enforcement against "non-signers" shall not be deemed to be a burden on commerce prohibited by the commerce clause. Section 5(a)(4) thus amounts to a declaration of Congressional assent to state regulations affecting commerce which would otherwise be forbidden by the commerce clause.

We recognize that Congress can undoubtedly "redefine the distribution of power over interstate commerce" *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 89 L. ed. 1915, and permit the states to exercise their own powers of sovereignty in a manner otherwise prohibited by the commerce clause. But we believe Congress' power of redistribution

is confined to matters in which the individual states may be said to have a special interest, either because the regulation of commerce is incidental to some exercise of the ordinary police powers of the State in matters not affecting interstate commerce (e. g., a prohibition against the resale of liquor in "dry" territory, although received in interstate commerce, *In re Rahrer,* 140 U. S. 546, 35 L. ed. 572), or because the regulation of commerce is required to protect the citizens of the State who come in contact with that commerce (*e. g.,* state regulation of the insurance business, *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342). Certainly no decision of this Court yet establishes that Congress' authority to "redefine the distribution of power over interstate commerce" is unlimited and extends to all subjects of regulation. Notwithstanding *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 90 L. ed. 1342, it cannot yet be settled law, for example, that Congress can permit the State of New York to fix the price of railroad travel from New York City to Los Angeles.

The explanation offered to justify resale price maintenance under the due process clause is that it is necessary to protect the "good will" associated with the manufacturer's trade-mark (See *Old Dearborn Distributing Co.* v. *Calvert Distillers Corp.,* 299 U. S. 183, 195). And since the manufacturer will, more often than not, be an out-of-state interest, the State "Fair Trade Law", unlike insurance regulation, cannot be justified as an effort to protect local interests in their contact with commerce. In the present case, the regulating state has far less special interest in the subject matter of regulation than in any previous instance in which this Court has sustained Congress' power to permit state burdens on commerce. The attack made below on the Federal Trade Commission Act, as amended by the McGuire Act, thus required the state Court to decide two important federal questions of substance not heretofore determined by this Court (Rule 19(1)(a) of the Rules of this Court), viz.: whether the New York "Fair Trade" Act is invalid under

the commerce clause, and whether the McGuire Act is ineffective to remove that Constitutional disability. Thus far, the argument here made on the merits is essentially that made on the appeal, except that here the Question Presented is the claimed invalidity of the McGuire Act, while the appeal argues the concurrent invalidity of the State statute.

Viewed as an exercise of the state's original sovereignty, we believe, as already indicated, that the State Fair Trade Act violates the commerce clause, insofar as that clause is a restriction on the exercise of the sovereign powers of the State. But Congress itself undoubtedly has power to legislate on the question of resale price maintenance under the commerce clause, so far as such legislation could be made to conform with due process. And Section 5(a)(4) of the Act may perhaps be viewed, not as a consent by Congress to the exercise of sovereign powers, originally belonging to the States, but as an attempt by Congress to delegate its own commerce powers to the States. Considered in that light, however, the delegation is plainly invalid, since no standards are provided by which the delegated powers are to be exercised. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 79 L. ed. 1570.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and the case should be set down for argument together with the appeal in this cause.

Respectfully submitted,

SIDNEY A. DIAMOND
of New York City,
Attorney for Petitioner.

ROOSEVELT, FREIDIN & LITTAUER,
HERBERT PRASHKER
and
MURRAY GARTNER,
Of Counsel.

Dated: New York City,
September 1, 1954.

APPENDIX

General Business Law of the State of New York

(McKinney's Consolidated Laws of New York)

ARTICLE XXIV-A—FAIR TRADE LAW

"§ 369-a. *Price fixing of certain commodities permitted.*

1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court."

"§ 369-b. *Unfair competition defined and made actionable.*

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

"§ 369-c. *Exceptions.*

This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

"§369-d. *Definitions.*

The following terms, as used in this article, are hereby defined as follows: 'Producer' means grower, baker, maker, manufacturer or publisher. 'Commodity' means any subject of commerce."

"§ 369-e. *Effect of partial invalidity.*

If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect. Added L. 1940, c. 195, § 3, eff. March 19, 1940."

Section 5 of Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act), 15 U. S. C. § 45:

(a) (1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

The Opinions Below

Opinion in the New York Court of Appeals:

GENERAL ELECTRIC COMPANY,

Respondent,

v.

MASTERS, INC.,

Appellant.

LIONEL CORPORATION,

Respondent,

v.

S. KLEIN ON THE SQUARE, INC.,

Appellant.

RAXOR CORPORATION et al.,

Respondents,

v.

SAM GOODY,

Appellant.

Argued April 19, 1954; decided June 4, 1954.

* * * * *

APPEAL, in the first above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered January 5, 1954, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (O'BRIEN, *J.*).

APPEAL, in the second above-entitled action, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered October 26, 1953, unanimously affirming a judgment of the Supreme Court in favor of plaintiff, entered in New York County upon a decision of the court at Special Term (BENVENGA, *J.*).

APPEAL, in the third above-entitled action, on constitutional grounds, from a judgment in favor of plaintiff, entered December 31, 1953, upon a resettled order of the Appellate Division of the Supreme Court in the first judicial department, which modified, and, as modified, affirmed a judgment of the Supreme Court in favor of plaintiffs, entered in New York County upon a decision of the court on a trial at Special Term (ISIDOR WASSERVOGEL, Special Ref.). The modification consisted of deleting phonograph records bearing the trade-mark "Soria Series" from the injunctive provisions of the judgment.

* * * * *

FROESSEL, *J.* We are again confronted with an attack upon the so-called Feld-Crawford "Fair Trade Law" (General Business Law, § 369-a *et seq.*, L. 1935, ch. 976, reenacted L. 1940, ch. 195). This statute first came before us for review in *Doubleday, Doran & Co.* v. *Macy & Co.* (269 N. Y. 272), decided January 7, 1936, wherein plaintiff Doubleday sought to enjoin Macy, a nonsigner of its fair trade agreements, from selling three of plaintiff's books at less than their stipulated fair trade prices. We held that the "non-signer" provision was unconstitutional, because by its means the Legislature was indirectly fixing

prices, a result which it could not, absent special circumstances, accomplish directly.

Exactly eleven months later, the Supreme Court of the United States reviewed a similar statute enacted in Illinois, the validity of which was attacked "upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment". Rejecting these contentions, the Supreme Court held that the statute was not "so arbitrary, unfair or wanting in reason as to result in a denial of due process", that it did not constitute an unlawful delegation of legislative power, and that it satisfied the test of equal protection of the laws guaranteed by the Fourteenth Amendment (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183).

Almost immediately thereafter, the New York statute was again before us in *Bourjois Sales Corp.* v. *Dorfman* (273 N. Y. 167). This time, relying on the *Old Dearborn* decision, we upheld the statute against claims that it violated the *New York State* Constitution. Indeed, Chief Judge CRANE, who wrote for the court in *Doubleday* as well as the *Bourjois* case, said in the latter (p. 172): "Had the *Seagram* [*Old Dearborn*] case been decided before argument in the *Doubleday* case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now". The statute has since been considered and applied by us in at least four cases (*Port Chester Wine & Liquor Shop* v. *Miller Bros. Fruiterers*, 281 N. Y. 101 [retailer's right of action]; *Guerlain, Inc.* v. *Woolworth Co.*, 297 N. Y. 11, certiorari denied 332 U. S. 837 [rebottling of perfumes]; *Calamia* v. *Goldsmith Bros.*, 299 N. Y. 636, remittitur amended 299 N. Y. 795 [cigars in interstate commerce]; and *Bristol-Myers Co.* v. *Picker*, 302 N. Y. 61 [trading stamps as price cutting]), in all of which

validity of the law under the New York State Constitution was urged upon us by the parties, but rejected.

In each of the three cases now before us, the defendant, a nonsigner of the plaintiff's fair trade agreements, has been enjoined from selling plaintiff's fair traded products at less than their stipulated minimum prices. All of the transactions in issue involve interstate commerce either directly or indirectly, and, since in large measure the issues presented by the three cases are identical, they shall be discussed together, insofar as possible.

Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of section 1 of article III of the New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former.

Seventeen years ago we disposed of the delegation of power and due process arguments in the *Bourjois* case (*supra*). Even though our opinion did not separately and specifically discuss those issues as arising under the State Constitution, they were actually presented and argued to our court, were necessarily disposed of by our decision there, and are therefore no longer open to question.

Defendants' economic and policy arguments concerning the doubtful wisdom of fair trade laws have been urged before the courts over and over again. They were reviewed in the *Old Dearborn* case (*supra,* pp. 195-196), and, as was there said, "Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature"; its determination "is conclusive so far as this court is concerned" (p. 196). Such contentions are properly addressed to the Legisla-

ture; they do not alone provide sufficient reason for us to reopen settled constitutional issues.

Nor is there merit to defendants' contention that the statute denies equal protection of the laws. In the *Old Dearborn* case (*supra*) the equal protection argument which was there raised against the Illinois fair trade statute was summarily rejected by the Supreme Court in its holding (p. 197): "Clearly, the challenged section of the Illinois act *satisfies this test*" (emphasis supplied). In the present case, moreover, the statute creates no unreasonable or arbitrary discrimination against low cost, minimum service retailers, as defendants contend. The statute itself does not purport to create any such distinction or classification. Its provisions are wholly inapplicable to unmarked goods. As to marked goods, it merely permits a manufacturer, whose trade-mark or brand name may represent a large advertising investment and a carefully nutured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade-mark and good will by reselling his identified products at unreasonably low prices. Finally, we have already held that this statute constitutes a reasonable regulation under the police power (*Bourjois* case, *supra*).

Defendants now present a new constitutional challenge by attacking the Maguire Act (66 U. S. Stat. 632, U. S. Code, tit. 15, § 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Corp.* (341 U. S. 384). That act exempts from the Federal antitrust laws fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against nonsigners as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the States power over interstate commerce which is denied them under the Federal Constitution.

Beginning with the familiar distinction between commerce which, while primarily local, indirectly affects interstate commerce, and that which is directly of national concern, defendants claim that the latter type of commerce is, by virtue of the Constitution, *exclusively* within the power of Congress, and cannot under any circumstances be regulated by the States. However, this basic distinction is drawn merely to determine the extent of State power in those areas where Congress by its silence has permitted its own power to remain dormant. The distinction does not, as defendants contend, restrict the power of a State acting, as here, under an express grant by Congress (*Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421-423). As the Supreme Court said in *Southern Pacific Ry. Co.* v. *Arizona* (325 U. S. 761, 769): "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible [citations]".

It is true that in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*) the Supreme Court held that by the Miller-Tydings amendment (50 U. S. Stat. 693, U. S. Code, tit. 15, § 1), which exempted from the Sherman Antitrust Act only "contracts or agreements". Congress did not demonstrate an intent to permit fair trade "compulsion" against nonsigners of those agreements. However, the court did not in its opinion indicate that such "compulsion", if expressly authorized by Congress, would transgress any constitutional prohibition; indeed, the decision contains clear implications to the contrary. The Maguire Act now authorizes such "compulsion", and its constitutionality has been upheld by the United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.* (205 F. 2d 788), a decision which the Supreme Court twice refused to review (certiorari denied 346 U. S. 856, rehearing denied 346 U. S. 905).

Nor should we for this purpose distinguish between transactions affecting interstate commerce, as in the *General Electric* and *Lionel* cases herein, and those directly in interstate commerce, such as the mail-order sales of the *Raxor* case. Just as in the Feld-Crawford Act, where no distinction is drawn between interstate and local commerce, so the language of the Maguire Act makes no discrimination between sales of goods affecting, and sales directly in, interstate commerce. On the contrary, the purpose of that Federal statute, as expressed by Congress in its preamble thereto, was to permit State fair trade laws to apply to commodities, contracts and activities "in or affecting" interstate commerce. Furthermore, the case of *Sunbeam Corp.* v. *Wentling* (185 F. 2d 903, revd. 341 U. S. 944, mod. 192 F. 2d 7), on which defendants rely so heavily in this connection, was decided prior to the Maguire Act's enactment. That the statute was designed to alter the *Wentling* rule so as to open all interstate commerce to the operation of State fair trade acts, appears from the statutory language as aforesaid, from its legislative history and from judicial decision (*Sunbeam Corp.* v. *MacMillan,* 110 F. Supp. 836).

Defendants further contend that the Feld-Crawford Act was never originally intended by our Legislature to apply to resale price maintenance as against nonsignatories engaged in interstate commerce, and that without re-enactment after passage of the Maguire Act it cannot be so applied. But the case of *People* v. *Bootman* (180 N. Y. 1), on which defendants rest this argument, is inapplicable here. True, we there held that without re-enactment after passage of the Congressional enabling statute, our State Fish and Game Law was not applicable to interstate game. But there, we had previously held that the statute in question was intended to apply only to *local* game (*People* v. *Buffalo Fish Co.,* 164 N. Y. 93).

In the instant cases, however, instead of having, by prior decision, limited the Feld-Crawford Act to local commerce, we have squarely held that the statute applies to non-signatories in *interstate* commerce (*Calamia* v. *Goldsmith Bros., supra*). Although such application was later declared unconstitutional in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*), passage of the Maguire Act in 1952 removed the final barrier to complete interstate application of the New York statute. Under such circumstances it has long been well established that the Constitution does not require a State statute to be re-enacted in order to be effective (*Matter of Rahrer,* 140 U. S. 545; *Central Pacific R. R. Co.* v. *Nevada,* 162 U. S. 512; *Tua* v. *Carriere,* 117 U. S. 201; 1 Sutherland on Statutory Construction [3d ed.], § 2027).

Each of the defendants contends that its plaintiff's fair trade contracts do not comply with the provisions of section 369-a of the General Business Law. We have examined these contracts separately, and find on the records before us that in each case there were in existence fair trade contracts which did comply with that part of the statute which sanctions such contracts between "vendor" and "buyer".

Numerous other contentions have been raised by one or more of the defendants. We have carefully considered each of them and find them to be without merit.

The judgment in each case should be affirmed, with costs.

LEWIS, *Ch. J.*, CONWAY, DESMOND, DYE and FULD, *JJ.*, concur; VAN VOORHIS, *J.*, taking no part.

In each action: Judgment affirmed.

Decision by Benvenga, *J.*, in New York Supreme Court, New York County, Special Term, Part VI

This is an action under the Feld-Crawford Fair Trade Act (General Business Law, sec. 369-a et seq.), to enjoin defendant from selling toy electric trains and accessories manufactured by the plaintiff under the trade mark "Lionel" at less than the fair trade retail prices established for the commodity. The facts have been stipulated. The principal questions raised are: (1) whether the act is constitutional; and (2) whether the plaintiffs' form of "fair trade" agreement complies with the requirements of the act. On the authority of General Electric v. Klein (N. Y. L. J., February 20, 1953, p. 583, Walter, J.), judgment is directed for the plaintiff in accordance with the prayer for relief. Settle judgment providing for a reference to assess damages.

The Judgments Below

Index No. 16151/1952

At a Special Term, Part VI of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Foley Square, Borough of Manhattan, City of New York, on the 20th day of May, 1953.

Present:

HON. FELIX C. BENVENGA,
Justice.

THE LIONEL CORPORATION,
Plaintiff,

against

S. KLEIN ON THE SQUARE, INC.,
Defendant.

This action having been instituted by the plaintiff against the defendant for an injunction and for damages, and the cause having duly come on to be heard before me for trial at Special Term Part VI of this Court, at the New York County Courthouse, Borough of Manhattan, City, County and State of New York, on the 7th day of April, 1953, and the parties having appeared by their respective counsel and having presented their proofs and due deliberation having been had thereon, and a written decision dated May 11, 1953, having been made and filed, and the Court having directed judgment as hereinafter provided,

Now on motion of Klein, Wikler & Gottlieb, attorneys for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED:

That the defendant, S. Klein on the Square, Inc., its officers, agents, servants and employees and all other persons acting under its authority or control be, and they hereby are permanently enjoined and restrained from, advertising, offering for sale or selling at retail in the State of New York, Lionel model toy trains and accessories bearing plaintiff's trademarks, brands and name, all as more particularly described in the price sheet annexed to the complaint herein and subsequent revisions thereof and substitutions therefor, at prices lower than the retail resale prices now established therefor by the plaintiff, pursuant to agreements entered into between the plaintiff and various retail dealers in such commodities throughout the State of New York, or at such retail resale prices as may hereafter be established for such commodities by the plaintiff as provided in said agreements; and it is further

ORDERED, ADJUDGED AND DECREED:

That the plaintiff, The Lionel Corporation, of 15 East 26th Street, Borough of Manhattan, City and State of New York, do recover of the defendant, S. Klein on the Square, Inc., of 6 Union Square, Borough of Manhattan, City and State of New York, the sum of $176.50 costs and disbursements as taxed by the Clerk of the Court.

Enter

F. C. B.,
J. S. C.

ARCHIBALD R. WATSON,
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE LIONEL CORPORATION,

Plaintiff,

against

S. KLEIN ON THE SQUARE, INC.,

Defendant.

The above named defendant, S. Klein on the Square, Inc., having appealed to the Appellate Division of the Supreme Court, First Judicial Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of New York on the 20th day of May, 1953, which judgment was entered in favor of the plaintiff and against the defendant; and the said appeal having come on to be heard before the Appellate Division, First Judicial Department, and the said Appellate Division having duly made an order, a certified copy of which, with the papers on which the appeal was heard, was filed on the 15 day of October, 1953, in the office of the Clerk of the County of New York, by which it appears that said Appellate Division has ordered that the said judgment so appealed from as aforesaid be in all things affirmed, with costs, and said costs having been duly taxed,

Now on motion of Klein, Wikler & Gottlieb, attorneys for the plaintiff, it is

ADJUDGED that the judgment herein entered on the 20th day of May, 1953, be and the same hereby is in all things affirmed; and it is further

ADJUDGED that the said plaintiff recover of the defendant, S. Klein on the Square, Inc., the sum of $180.30 the

amount of costs herein as taxed, and that it have execution against said defendant, S. Klein on the Square, Inc., therefor.

Judgment signed and entered this 26 day of October, 1953.

ARCHIBALD R. WATSON,
Clerk.

COURT OF APPEALS

STATE OF NEW YORK ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall in the City of Albany, on the 4th day of June in the year of our Lord one thousand nine hundred and fifty-four, before the judges of said Court.

WITNESS,

The HON. EDMUND H. LEWIS,
Chief Judge, Presiding

RAYMOND J. CANNON, Clerk

Remittitur—June 4, 1954

THE LIONEL CORPORATION,
Respondent,

vs.

S. KLEIN ON THE SQUARE, INC.,
Appellant.

BE IT REMEMBERED, That on the 11th day of March in the year of our Lord one thousand nine hundred and fifty-four, S. Klein on the Square, Inc., the appellant in this cause, came here unto the Court of Appeals, by Roosevelt,

Freidin & Littauer, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, And The Lionel Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by Klein, Winkler & Gottlieb, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sidney A. Diamond, of counsel for the appellant, and by Mr. Harry A. Gottlieb, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, & c.

Raymond J. Cannon
Clerk of the Court of Appeals
State of New York

Court of Appeals, Clerk's Office,
Albany, June 4, 1954

I Hereby Certify, that the preceding record contains a correct transcript in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

(Seal)

Office - Supreme Court,
FILED
SEP 29 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1954.

No. 327

S. KLEIN ON THE SQUARE, INC.,
Petitioner,

AGAINST

THE LIONEL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION.

HARRY A. GOTTLIEB,
50 Broad Street,
New York, N. Y.
Attorney for Respondent.

KLEIN, WIKLER & GOTTLIEB
and
N. H. ELMAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1964.

No. 327.

S. KLEIN ON THE SQUARE, INC.,

Petitioner,

AGAINST

THE LIONEL CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinion Below.

The opinion of the New York Court of Appeals is officially reported at 307 N. Y. 229 and 120 N. E. (2d) 802 and appears in the Petition as an appendix (Pet. 13-20).

Statutes Involved.

The statutory provisions involved are §5 of the Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act) 15 U. S. C. §45 and Article XXIV-A of the General Business Law of the State of New York (Fair Trade Law). These statutory provisions are set forth in the Petition as an appendix (Pet. 9-12).

Statement of the Case.

The respondent, a New York corporation, has for many years been and is presently engaged in the business of manufacturing, selling and distributing throughout the United States toy trains and accessories under its exclusive trademarks, brands and labels bearing the name "Lionel" alone or in combination. Its manufacturing activities are conducted partly within and partly outside the State of New York. During the past years, the respondent has built up considerable good will with the purchasing public and with the retailers in the State of New York and elsewhere.

Respondent's products are in fair and open competition throughout the State of New York with commodities of the same general class produced by others.

The respondent and retail dealers entered into a retail price maintenance agreement.

The petitioner, likewise a New York corporation, operates a department store in New York City, but did not enter into any agreement with the respondent relating to the resale price of the respondent's products.

The petitioner offered respondent's trains at prices below those fixed under respondent's agreement with other retailers.

§369-b of New York's General Business Law prohibits all retailers in the State of New York from selling below prices established by an agreement between a vendor and any retailer within the state.

Respondent thereupon commenced this action in the New York Supreme Court, New York County, enjoining petitioner from continuing to offer respondent's products at below respondent's "fair trade" prices.

After the cause was submitted on stipulated facts, the Supreme Court granted judgment for respondent and judgment was entered pursuant to §369-b of the General Business Law, enjoining petitioner from selling respondent's toy trains below prices fixed by respondent. Both the Appellate Division of the Supreme Court and the Court of Appeals affirmed the judgment.

ARGUMENT.

A. The decision of the New York Court of Appeals does not conflict with any decisions of that Court or of this Court.

The constitutionality of the McGuire Act and of the Feld-Crawford Act, popularly known as the New York Fair Trade Law, are no longer open to question. This Court and the New York Court of Appeals have consistently rejected the petitioner's arguments that the fair trade laws are invalid under the Fourteenth Amendment of the Constitution of the United States, as a deprivation of property, without due process of law and that they are a burden on interstate commerce.

Fair trade laws have a long and checkered career. They have been vigorously proposed and just as vigorously opposed by our Courts. The will of the people as evidenced by the acts of the legislature was finally confirmed by our Courts. The compelling legislative history of congressional action is reflected by the Miller-Tydings Act amending the Sherman Antitrust Act, and congressional persistence in passing the McGuire Act in 1952 leaves no room for doubt as to what our lawmakers intended to accomplish in the field of fair trade. The wisdom or lack of wisdom in permitting fair trade laws to prevail in this country is a matter for the legislature and not for the

judiciary to determine. *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183; *Nebbia* v. *New York*, 291 U. S. 502; *Port Chester Wine & Liquor Shop Inc. et al* v. *Miller Brothers, etc.*, 253 App. Div. 188, 1 N. Y. S. (2d), 802 affirmed 281 N. Y. 101, 22 N. E. 2nd 253.

The petitioner's proposition in this case is broad and bold. It asks this Court to disregard the will of Congress, the will of the New York State legislature, the determination of the New York Court of Appeals and the determination of this Court. *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp., supra; Schwegmann Brothers Giant Supermarket, et al.* v. *Eli Lilly & Company*, 109 F. Supp. 269, 205 F. (2d) 788 (C. A. 5, 1953), cert. den. 74 S. Ct. 71; *Bourjois Sales Corporation* v. *Dorfman*, 273 N. Y. 167 (1937); *Bristol Myers Co.* v. *Picker*, 302 N. Y. 61 (1950); *The Lionel Corporation* v. *S. Klein on the Square* (sought to be reviewed), 307 N. Y. 229, 120 N. E. 2nd 802.

The petitioner, in effect, asks this Court to reverse its decision in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936), upon the theory that its basic premise has been invalidated by this Court's recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (Statement as to Jurisdiction 6).

Resale price maintenance contracts were first expressly validated in California with the passage of the Fair Trade Act in 1931. These statutes merely legalized resale price agreements and only contracting parties were bound thereby. Two years later, the Act was amended to include a "non-signers" clause, whereby it became unlawful for any dealer to sell below established prices whether or not he had contracted to observe them. Other fair trade acts soon followed, but doubt as to their constitutionality prevented nationwide enactment, until this doubt was resolved by this Court in 1936, when it upheld the Illinois Fair

Trade Act in its entirety in the *Old Dearborn* case above referred to.

The New York Court of Appeals in *Bourjois Sales Corporation* v. *Dorfman, supra,* accepted the judgment of this Court overruling its prior decision in *Doubleday Doran & Co. Inc.* v. *R. H. Macy & Co. Inc.,* 269 N. Y. 272, 199 N. E. 409.

Obviously, one of the most significant features of the state fair trade acts is that non-signers of fair trade agreements are bound to observe the resale price provisions contained in said agreements.

The effectiveness of the Miller-Tydings Act (1937) by way of amendment to the Sherman Antitrust Act, in exempting fair trade agreements from the Sherman Antitrust Act, depended to a large extent upon whether or not it also exempted the enforcement of these agreements against one who was not a party thereto. This question came before this Court in *Schwegmann Bros.* v. *Calvert Distillers Corp., supra.* In that case, this Court determined that the Miller-Tydings Act exempted from the Sherman Antitrust Act only voluntary agreements, where such agreements are lawful under local law, but that the Sherman Antitrust Act is violated by a state fair trade law which permits enforcement of an interstate price agreement for the maintenance of minimum resale prices, against a dealer who is not a party to the agreement.

Congress promptly acted to enlarge the scope of the Miller-Tydings Act and passed the McGuire Act in 1952.

It is seriously doubted that *Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* opened the door to an appraisal of the *Old Dearborn* case. The *Schwegmann* v. *Calvert* case involved no constitutional question and confined itself solely to the interpretation of the Antitrust Act as amended by the Miller-Tydings Act with respect to the enforcement of state fair trade laws in interstate

commerce. This Court decided therein that the intention of Congress was to authorize interstate enforcement against the signers of an expressed contract or an agreement, but not against non-signers. There is no implication in the *Schwegmann* case that Congressional approval of enforcement against non-signers would be unconstitutional. In fact, the implications of the opinion are to the contrary. *Schwegmann Brothers Giant Supermarket, et al.* v. *Eli Lilly & Company*, 109 F. Supp. 269, 205 F. (2d) 788 (C. A. 5, 1953), a decision which this Court twice refused to review (cert. den. 346 U. S. 856, rehearing den. 346 U. S. 905); *The Lionel Corporation* v. *S. Klein on the Square, Inc.*, 307 N. Y. 229, 120 N. E. 2nd 802 (case below).

B. The decision of the New York Court of Appeals is consistent with time honored principles.

Not only are the petitioner's charges of conflict with other decisions groundless, but the decision of the Court of Appeals in this case is based upon sound principles which have long been accepted by this Court.

The general rule is firmly established that the provisions of the Fourteenth Amendment do not operate as a limitation upon the police power of the state to pass and enforce such laws as will inure to the health, morals and general welfare of the people. Statutes designed to protect trade and commerce from unlawful restraints and monopolies are not unconstitutional as depriving those to whom they apply of their property or privileges without due process of law. *Nebbia* v. *New York*, 291 U. S. 502; *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183; see also *Appalachian Coals, Inc. et al.* v. *United States* (1933), 288 U. S. 344.

The Fifth and Fourteenth Amendments were invoked as a challenge to the constitutionality of the Illinois Fair Trade statute in the *Old Dearborn* case, *supra*. This

Court in the *Old Dearborn* case met the challenge by distinguishing between cases involving legislative price fixing and fair trade cases (229 U. S. 192); by proclaiming that the price restriction under a fair trade contract is an appropriate means of a perfectly legitimate end, since a commodity acquired under such fair trade agreement is acquired with knowledge of an existing restriction. The voluntary acquisition of such commodity carries with it an assent to the protective restriction thereon (299 U. S. 192). By deciding that the non-signers' clause is not arbitrary, unfair or wanting in reason, since it is intended to protect good will against injury as applied to branded merchandise (299 U. S. 195).

The due process arguments were disposed of by the New York Court of Appeals in *Bourjois Sales Corporation* v. *Dorfman,* 273 N. Y. 167 (1937) and in the case below.

The petitioner's arguments concerning delegation of powers were likewise disposed of many years ago in the *Old Dearborn* case and in the *Bourjois* case *supra* and in the case below.

Congress in passing the Miller-Tydings Act and in later enlarging that by passing the McGuire Act did not abdicate any power; it merely erased some of the prohibitions contained in the original Sherman Antitrust Act. The states, likewise, abdicated no lawmaking power in enacting fair trade acts; they merely defined what they considered to be unfair competition.

The petitioner contends that the New York statute is unconstitutional under the commercial clause of the Federal Constitution, despite Congress' effort to immunize fair trade legislation by the McGuire Act. (Statement as to Jurdisdiction 15.)

Prudential Insurance Co. Inc. v. *Benjamin,* 328 U. S. 408 and *Southern Railway Co.* v. *Arizona,* 325 U. S. 761

have disposed of this issue and are referred to in the opinion below. Congress by passing the Miller-Tydings and the McGuire Acts, has undoubtedly acted within its power "to redefine the distribution of power over interstate commerce" by permitting states to regulate a phase of commerce in a manner which would otherwise not be permissible. The instances are numerous in which Congress by inaction has allowed states to regulate interstate commerce for long periods of time (*The Minnesota Rate Cases*, 230 U. S. 352, 396-400). Obviously, there should be even less restriction upon the power of a state acting under an expressed grant by Congress under the McGuire Act.

CONCLUSION.

The petitioner has presented no arguments which have not been presented many times before, both to this Court and to the State and Federal Courts throughout the land. These arguments have not met with favor by our Courts. The petitioner's petition is untenable in face of precedent and the will of the legislature.

The decision of the New York Court of Appeals in the case below was clearly correct.

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

HARRY A. GOTTLIEB,
Attorney for Respondent.

KLEIN, WIKLER & GOTTLIEB
and
N. H. ELMAN,
Of Counsel.

Dated: New York City
September , 1954.